Uniway Marine Products Sdn Bhd v Messrs G Ravi (a law firm)

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-24–8–08 OF 2019
AWANG ARMADAJAYA JC
10 DECEMBER 2019

Civil Procedure — Injunction — Fortuna injunction — Plaintiff applied for Fortuna injunction to stop defendant's winding up petition — Defendant applied for striking out plaintiff's application — Whether defendant was solicitor on record acting for plaintiff — Whether there was debt due and payable to defendant by plaintiff amounting to RM69,500 — Whether application for Fortuna injunction was appropriate

This was an application by the plaintiff ('encl 1') pursuant to O 9 r 1 of the Rules of Court 2012 ('the ROC 2012') sought that Messrs G Ravi was estopped from filing a winding up petition against the plaintiff that was premised on a statutory notice dated 24 July 2019. The defendant filed an application (encl 4') pursuant to O 18 r 19 (1)(a) of the ROC 2012 for encl 1 was struck out. Mr Lee Wei Shooi, was a director in the plaintiff's board of directors and had obtained the services of Messrs Lau Kok Guan Liana & Kuan on 2 February 2019 as the plaintiff's solicitors and to act for the plaintiff in an action between the plaintiff Manjong Bio Ocean Sdn Bhd. Messrs Lau Kok Kuan, Liana & Kuan then engaged Mr G Ravi, a partner practising under the name of Messrs G Ravi as a counsel for the plaintiff. The plaintiff filed a notice for the change of solicitors from Messrs Lau Kok Kuan, Liana & Kuan to Messrs G Ravi vide encl 26 of the Case JA-22NCC-57–12 of 2018 ('the first case'). In that action, the plaintiff entered into a consent judgment with the defendant of the first case. During the proceedings in the first case when the consent order was entered, Mr Lee Wei Shooi was present and gave, on oath, his consent for the consent order for the first case to be entered between parties. Mr C Sivasankar from Messrs G Ravi was present and there was no complaint by Mr Lee against the presence of Mr C Sivasankar or Messrs G Ravi. The defendant issued a bill of cost to the sum of RM69,500 to the plaintiff on 25 May 2019. However, since no payment was forthcoming from the plaintiff to the defendant, the defendant issued a statutory notice pursuant to s 466(1)(a) of the Companies Act 2016 to the plaintiff, giving the plaintiff a 21 days period from the date of receipt of the notice ('the said notice') to make good the payment demanded, failing which the defendant would initiate a winding up proceeding against the plaintiff. As against the issuance of the said notice, the plaintiff sought a Fortuna injunction against the defendant to prevent the defendant from initiating such proceedings. The issues were: (a) whether the defendant was the solicitors on record acting for the plaintiff in

Suit JA-22NCC-57–12 of 2018; (b) whether there was a debt due and payable to the defendant by the plaintiff amounting to RM69,500; and (c) whether Fortuna injunction ('encl 1') or the application ('encl 4') to strike out encl 1 was appropriate.

Held, dismissing plaintiff's application in encl 1 and allowing the defendant's application in encl 4:

(1) The director of the company was present affirmed on oath that he consented to the consent judgment after having explained and understood the consent judgment by the counsel. The court was entitled to take judicial notice under s 57 of the Evidence Act 1950, of proceedings in courts in Malaysia. The notice of change of solicitor was made pursuant to O 64 r 1 of the ROC 2012. The encl 26 was valid and good in law. It was supported by Mr Lee Wei Shooi, who was personally present and by his conduct, as a managing director of the plaintiff that the plaintiff recognised the defendant as its solicitors in the first suit. The defendant was indeed the solicitors for the plaintiff in the first suit (see paras 10–11 & 13–15).

(2) The court had earlier ruled that the plaintiff owed the defendant to the sum of RM69,500. There was no reason to grant a Fortuna injunction. The court allowed the striking out against encl 1 pursuant to encl 4 with cost. There was such a bill which was given more than a month before notice under s 466(1) of the Companies Act 2016 (see paras 20–22).

[Bahasa Malaysia summary

Ini adalah permohonan oleh plaintif ('lampiran 1') berdasarkan A 9 k 1 dari Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') meminta agar Tetuan G Ravi dihentikan dari memfailkan petisyen penggulungan terhadap plaintif berdasarkan pada notis statutori bertarikh 24 Julai 2019. Defendan memfailkan permohonan ('lampiran 4') menurut A 18 k 19(1)(a) KKM 2012 untuk lampiran 1 dibatalkan. Lee Wei Shooi, adalah seorang pengarah di dalam lembaga pengarah plaintif dan telah mendapatkan khidmat Tetuan Lau Kok Guan Liana & Kuan pada 2 Februari 2019 sebagai peguamcara plaintif dan bertindak sebagai plaintif dalam tindakan antara plaintif dan Manjong Bio Ocean Sdn Bhd. Tetuan Lau Kok Kuan, Liana & Kuan kemudian melantik Encik G Ravi, rakan kongsi yang berkhidmat dengan nama Tetuan G Ravi sebagai peguam bagi pihak plaintif. Plaintif mengemukakan notis untuk pertukaran peguam dari Tetuan Lau Kok Kuan, Liana & Kuan kepada Tetuan G Ravi vide lampiran 26 Kes JA-22NCC-57–12 of 2018 ('kes pertama'). Dalam tindakan itu, plaintif memasuki penghakiman persetujuan dengan defendan kes pertama. Semasa prosiding kes pertama ketika perintah persetujuan dimasukkan, Mr Lee Wei Shooi hadir dan memberikan, atas sumpah, persetujuannya untuk perintah persetujuan untuk kes pertama yang dimasukkan antara pihak-pihak terlibat. Mr C Sivasankar dari Tetuan G Ravi

hadir dan tidak ada bantahan oleh Mr Lee terhadap kehadiran Mr C Sivasankar atau Tetuan G Ravi. Defendan mengeluarkan bil kos berjumlah RM69,500 kepada plaintif pada 25 Mei 2019. Namun, kerana tidak ada pembayaran yang dikeluarkan dari plaintif kepada defendan, defendan mengeluarkan notis statutori berdasarkan s 466(1)(a) dari Akta Syarikat 2016 kepada plaintif, yang memberikan plaintif selama 21 hari dari tarikh penerimaan notis ('notis tersebut') untuk membuat pembayaran yang dituntut, jika tidak, defendan akan memulakan proses penggulungan terhadap plaintif. Berkenaan dengan pengisuan notis tersebut, plaintif meminta perintah injunksi Fortuna terhadap terdakwa untuk menghalang defendan untuk memulakan prosiding tersebut. Isu-isu yang ditimbulkan ialah: (a) sama ada defendan adalah peguam yang direkodkan untuk plaintif dalam tuntutan JA-22NCC-57–12 of 2018; (b) sama ada terdapat hutang yang perlu dibayar dan dibayar kepada defendan oleh plaintif berjumlah RM69,500; dan (c) sama ada injunksi Fortuna ('lampiran 1') atau permohonan ('lampiran 4') untuk membatalkan lampiran 1 adalah sesuai.

Diputuskan, menolak permohonan plaintif di dalam lampiran 1 dan membenarkan permohonan defendan dalam permohonan lampiran 4:

(1) Pengarah syarikat itu hadir dengan pengakuan bersumpah bahawa dia bersetuju dengan penghakiman persetujuan setelah penjelasan dan memahami penghakiman persetujuan oleh peguam. Mahkamah berhak mengambil notis kehakiman di bawah s 57 Akta Keterangan 1950, prosiding di mahkamah di Malaysia. Notis pertukaran peguam dibuat menurut A 64 k 1 dari KKM 2012. Lampiran 26 itu sah dan betul dari segi undang-undang. Ia disokong oleh Encik Lee Wei Shooi, yang secara peribadi hadir dan dengan kelakuannya, sebagai pengarah urusan plaintif bahawa plaintif mengiktiraf defendan sebagai peguambela dalam kes pertama. Defendan memang menjadi peguam bagi plaintif dalam kes pertama (lihat perenggan 10–11 & 13–15).

(2) Mahkamah sebelumnya telah memutuskan bahawa plaintif berhutang kepada defendan sejumlah RM69,500. Tidak ada alasan untuk memberikan injunksi Fortuna. Mahkamah membenarkan pembatalan lampiran 1 mengikut lampiran 4 dengan kos. Terdapat rang undang-undang seperti itu yang diberikan lebih dari sebulan sebelum notis di bawah s 466(1) Akta Syarikat 2016 (lihat perenggan 20–22).]

Cases referred to

Ng Hee Thong & Anor v Public Bank Bhd [2000] 2 MLJ 29; [2000] 1 CLJ 503, CA (refd)

Legislation referred to

Companies Act 2015 s 466(1)
Evidence Act 1950 s 57

Legal Profession Act 1976 s 124(1), (2)
Rules of Court 2012 O 9 r 1, O 18 r 19(1)(a), O 64 r 1

Allen Loh (Allen Loh & Co) for the plaintiff.
Ravichanthiran a/l Ganesan (G Ravi) for the defendant.

Awang Armadajaya JC:

INTRODUCTION

[1] This is an application by the plaintiff (encl 1) pursuant to O 9 r 1 of the Rules of Court 2012 seeking the following prayers:

(a) that Messrs G Ravi is estopped from filing a winding up petition against the plaintiff (Company Registration Number 780513-V) that is premised on a statutory notice dated 24 July 2019;

(b) the cost of the originating summon is to be borne by the plaintiff; and

(c) any other reliefs that the court deems just and fit.

[2] On the other hand, the defendant filed an application (encl 4) pursuant to O 18 r 19(1)(a) of the Rules of Court 2012 for the following orders:

(a) the originating summons (ex parte) date 7 August 2018 (encl 1) be struck out;

(b) all other proceedings in this action is to be stayed pending the final determination of their application; and

(c) any other orders that is deemed fit and proper by the court.

BACKGROUND FACTS

[3] Mr Lee Wei Shooi, is a director in the plaintiff's board of directors and has obtained the services of Messrs Lau Kok Guan Liana & Kuan on 2 Februry 2019 as the plaintiff's solicitors and to act for the plaintiff in an action between the Plaintiff v Manjong Bio Ocean Sdn Bhd (Reference No JA-22NCC-57–12 of 2018). Messrs Lau Kok Kuan, Liana & Kuan then engaged Mr G Ravi, a partner practising under the name of Messrs G Ravi as a counsel for the plaintiff.

[4] In the proceedings that follow, the plaintiff filed a notice for the change of solicitors from Messrs Lau Kok Kuan, Liana & Kuan to Messrs G Ravi vide encl 26 of the Case JA-22NCC-57–12 of 2018 (first case). The case was heard before this court. In that action, the plaintiff (first case) entered into a consent judgment with the defendant of the first case ie JA-22NCC-57–12 of 2018 (first case).

[5] During the proceedings in the first case when the consent order was entered, Mr Lee Wei Shooi was present and gave, on oath, his consent for the consent order (for the first case) to be entered between parties. Mr C Sivasankar from Messrs G Ravi was present and there was no complaint by Mr Lee against the presence of Mr C Sivasankar or Messrs G Ravi.

[6] Following that, the defendant issued a bill of cost to the sum of RM69,500 to the plaintiff on 25 May 2019. However, since no payment was forthcoming from the plaintiff to the defendant, the defendant issued a statutory notice pursuant to s 466(1)(a) of the Companies Act 2015 to the Plaintiff, giving the plaintiff a 21 days period from the date of receipt of the notice pursuant to s 466(1)(a) ('the said notice') to make good the payment demanded, failing which the defendant will initiate a winding up proceeding against the plaintiff.

[7] As against the issuance of the said notice, the plaintiff now seeks a Fortuna injunction against the defendant to prevent the defendant from initiating such proceedings.

THE ISSUES BEFORE THIS COURT

[8] The issues before this court are as follows:

(a) whether the defendant was the solicitors on record acting for the plaintiff in the Suit JA-22NCC-57–12 of 2018;

(b) whether there is a debt due and payable to the defendant by the plaintiff amounting to RM69,500; and

(c) whether on the facts of circumstances of this case, a Fortuna injunction is appropriate (encl 1) or whether the application (encl 4) to strike out encl 1 is appropriate.

Whether the defendant was solicitor on record acting for the plaintiff in the Suit JA-22NCC-57–12 of 2018

[9] After perusing over the affidavits and exhibit by all parties, I found in encl 6 which is the affidavit in reply of the defendant affirmed by Mr Ravichantiran Ganesan and found at para 10 of the averments which states that on 7 May 2019 there was a notice of change of solicitors which was encl No 26 of Suit JA-22NCC-57–12 of 2018 (the first suit).

[10] Further, before this court when the consent was entered between the plaintiff (also plaintiff in JA-22NCC-57–12 of 2018). The director of the company (Mr Lee Wei Shooi) was present on 22 July 2019 and he affirmed on

oath that he consented to the consent judgment after having explained and understood the consent judgment by the counsel (Mr Sivasankar).

[11] This court is entitle to take judicial notice under s 57 of the Evidence Act 1950, of proceedings in courts in Malaysia, even more so when it is before this court.

[12] In fact, the minutes of proceedings reads as follows:

> Enclosure 26 of Suit No JA-22NCC-57-12 of 2018 is a notice that the Defendant as a Solicitors firm now acts on behalf of the Plaintiff in our present case (also the Plaintiff in the first suit) replacing Tetuan Lau Kok Guan, Liana & Kuan.

[13] This notice of change of solicitor was made pursuant to O 64 r 1 of the Rules of Court 2012.

[14] I have scrutinised the encl 26 and found it to be valid and good in law. I do not think that I may, after finding encl 26 good in law and valid, choose to ignore it when the encl 26 was further supported by Mr Lee Wei Shooi, who was personally present and by his conduct, as a managing director of the plaintiff (a company), that the plaintiff recognised the defendant as its solicitors in the first suit. Denying the obvious is akin to hiding behind a blanket and say that the sun has not arisen at 12 noon!

[15] I therefore, ruled that the defendant was indeed the solicitors for the plaintiff in the first suit (who is incidentally, also the plaintiff in the instant case).

Whether there is a debt due and payable to the defendant by the plaintiff amounting to RM69,500

[16] Having ruled that the defendant was the solicitors on record for the plaintiff in the first suit (who are the plaintiff in our instant case), I now look at the conduct at para 6.

[17] I have perused over all the cause papers and found that no bills was exhibited by either party.

[18] However, the plaintiff admitted that they did receive the bill for the services rendered but refused to pay on account that they do not recognised the defendant as their solicitors in the earlier suit.

[19] Based on *Ng Hee Thong & Anor v Public Bank Bhd* [2000] 2 MLJ 29; [2000] 1 CLJ 503 , it was held that 'It is a well settled principle governing

the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted'.

Hence since there is no averment to the contrary, I find that it was not denied that invoices/bill were issued to the plaintiff by the defendant in respect of the services rendered in the earlier suit.

Whether in the facts of circumstances of this case a Fortuna injunction is appropriate (encl 1) or whether the application (encl 4) to strike out encl 1 is appropriate

[20] This court has earlier ruled that the plaintiff owed the defendant to the sum of RM69,500. I find no reason to grant a Fortuna injunction (encl 1).

[21] I allow the striking out against encl 1 pursuant to encl 4 with cost.

[22] Hence, since I found that there was such a bill which was given more than a month before notice under s 466(1) of the Companies Act 2015.

[23] Since, s 124(1) of the Legal Profession Act has been complied with, then after a full month is over, s 124(2) of the Act comes into operation.

> 124 No advocate and solicitor to sue for costs until delivery of bill of cost
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> (1) Except as authorized by this Act, *no advocate and solicitor shall* without the leave of the court *commence or maintain any action for the recovery of any costs due for any business done by him until the expiration of one month after he has delivered to the party to be charged therewith*, or sent by post to, or left with him at, his office or place of business, dwelling house or last known place of abode, a bill of costs, which bill shall be signed either by the advocate and solicitor, or in the case of a partnership, by any of the partners, either with his own name or with the name or style of the partnership, or by another advocate and solicitor employed by the first-named advocate and solicitor or the partnership, or be enclosed in or accompanied by a letter, signed in the like manner, referring to the bill.
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> *(2) Where a bill is proved to have been delivered in compliance with subsection (1) it shall not be necessary in the first instance for the advocate and solicitor to prove the contents of the bill and it shall be presumed until the contrary is shown to be a bill bona fide complying with this Act.*

[24] This presumption under s 124(2) of the Legal Profession Act has many purposes, among others:

(a) it treats advocates and solicitor on a different plane as compared to other professions;

(b) it spare the solicitors the cumbersome process of court proceedings possibly because they are, by the nature of the profession, part and parcel of court process; and

(c) advocates and solicitors are expected to display the highest standards of ethics and etiquettes and hence their word is a good as gold.

[25] The issue of the ramifications of the notice under s 466(1) of the Company Act is not for this court to consider in deciding both encls (1) and (4).

[26] This court, ruled that a debt of RM69,500 has been made out against the plaintiff by the defendant.

The plaintiff's application in encl 1 dismissed and the defendant's application in encl 4 allowed.

Reported by Mohd Kamarul Anwar